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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-559

THOMAS MICHAEL BEATTIE,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

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TOPICAL INDEX

	Page
Table of Authorities	ii
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	3
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	15
APPENDIX A	

TABLE OF AUTHORITIES

Cases	Page
Brady v. Maryland, 373 U.S. 83	11, 12
California v. Green, 399 U.S. 149	9
Chapman v. California, 386 U.S. 17, 21	10
Fahy v. Connecticut, 375 U.S. 85, 86-87	10
Giglio v. United States, 405 U.S. 150	12
Harrington v. California, 395 U.S. 250	10
People v. Ruthford, 14 Cal. 3d 399	11
People v. Hitch, 12 Cal. 3d 641, 645-646	11, 12
People v. Hitch, 12 Cal. 3d 399	11
Pointer v. Texas, 380 U.S. 400	9
United States v. Bryant, 439 F.2d 642	12

Constitutions

Sixth Amendment	2, 3, 9
Fourteenth Amendment	2, 10
United States Constitution	13
California Constitution, Article 1, Section 15	3
Fourth Amendment	10
Fourteenth Amendment, Section 1	3

Statutes

28 U.S.C. 1257(3)	2
California Evidence Code:	
Section 403	4, 8
Section 702	4
Section 1223	5, 9
Health and Safety Code:	
Section 11360	6
Section 11352	6, 7
Section 11351	6, 7
Section 11357	6
Section 11377	7

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TO: The Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks the issuance of a Writ of Certiorari to review California state action involving the judgment of the Court of Appeal of the State of California, Second Appellate District, affirming a judgment of the Superior Court of the State of California, County of

Los Angeles. A timely Petition for Hearing to the Supreme Court of the State of California was denied without opinion on July 6, 1979. The record reposes in the aforementioned Court of Appeal. There was a written opinion only by the Court of Appeal of the State of California, Second Appellate District. See Appendix A.

JURISDICTION

This Court has jurisdiction to review the judgment above-described under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Does the admission against Defendant of an alleged co-conspirator's statement violate Defendant's right of confrontation provided by the Sixth Amendment of the United States Constitution, since the prosecutor failed to make a prima facie showing of the preliminary facts, and the crime of conspiracy was not charged?

2. Was the deliberate, intentional failure of the officer to tape record his alleged telephone and other conversations with Defendant (and others) and his deliberate, intentional destruction of the notes he took of conversations a violation of Defendant's Fourteenth Amendment Due Process and equal Protection rights.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

UNITED STATES CONSTITUTION:

"In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. . . ."

SIXTH AMENDMENT:

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FOURTEENTH AMENDMENT, SECTION 1.

CALIFORNIA CONSTITUTION
Article 1, §15:

The defendant in a criminal cause has the right to . . . compel attendance of witnesses against the defendant . . .

. . .

Persons may not . . . be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law.

CALIFORNIA EVIDENCE CODE §403:

"(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court fines that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

(1) The relevance of the proffered evidence depends on the existence of the preliminary fact;

(2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;

(3) The preliminary fact is the authenticity of a writing; or

(4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.

(b) Subject to Section 702, the Court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary

fact being supplied later in the course of the trial.

(c) If the court admits the proffered evidence under this section, the court:

(1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does not exist.

(2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determine that a jury could not reasonably find that the preliminary fact exists.

§1223:

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;

(b) The statement was made prior to or during the time that the party was participating in that conspiracy; and

(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

STATEMENT OF THE CASE

Petitioner was charged joint with one Robert Parker Young, by an information filed in the Superior Court of the State of California For the County of Los Angeles, with five counts of violation of various sections of the California Health and Safety Codes, constituting felonies, as follows:

Count One: by Young: Violation of Health and Safety Code Section 11360 (Sale of and offer to sell, etc., marijuana in the form of concentrated cannabis).

Count Two: by Young and Beattie: Violation of Section 11352 (sale of and offer to sell, etc., cocaine).

Count Three: by Beattie: Violation of Section 11351 (possession of cocaine for purpose of sale).

Count Four: by Young: Violation of Section 11357 (a) (Possession of concentrated cannibis).

Count Five: by Beattie: Violation of Section 11377 (possession of amphetamine).

Petitioner was separately tried by a jury (without Young). On October 31, 1977, Petitioner was found guilty by separate written verdicts as follows:

1. Violation of Section 11352, Health and Safety Code, offering to sell cocaine, a felony, "as charged in Count I of the Information."

2. Violation of Section 11351, Health and Safety Code, possession for sale, cocaine, a felony "as charged in Count II of the Information."

3. Violation of Section 11377, Health and Safety Code, possession of an amphetamine, "as charged in Count III of the Information."

Petitioner moved for a new trial, citing error, which motion was denied, and on December 12, 1977, Petitioner was sentenced to a period of probation including six months in the county jail. Since sentencing, Petitioner has been free on $5,000 bail.

The testimony consisted basically of that of an undercover police officer who allegedly met with Petitioner's co-defendant allegedly arranged through an informer. Later that day the officer allegedly had telephone and other conversations with Petitioner and co-defendant wherein an offer to sell cocaine was allegedly made and a meeting allegedly arranged, at which alleged meeting Petitioner was arrested.

During the trial, over defense objections, telephone and other conversations of the officer with the co-defendant were admitted against Petitioner without a prior showing of the preliminary fact of conspiracy. (See California Evidence Code, §403.) The officer testified in effect that he had deliberately and intentionally not recorded the alleged telephone and other conversations and, while he had made notes of the conversations, he had deliberately destroyed these notes after writing up the police report.

REASONS FOR GRANTING THE WRIT

1. THE ADMISSION INTO EVIDENCE OF EXTRA-JUDICIAL STATEMENTS OF CO-DEFENDANT TO PROVE THE GUILT OF PETITIONER IS A VIOLATION OF STATE STATUTES, OF FEDERAL RIGHT OF CONFRONTATION AND A CONSTITUTIONALLY INVALID "BOOTSTRAPPING."

The hearsay rule exception for admissions of a co-conspirator permits the introduction of hearsay statements by a prosecutor if he establishes four preliminary facts:

1. The existence of a conspiracy;
2. The declarant made the statement while participating in the conspiracy;
3. The statement furthered the objective of the conspiracy; and
4. The Defendant against whom the statement is offered was a member

> of the conspiracy at the time the statement was made or at some time thereafter.

California Evidence Code, Section 1223.

In this case no such preliminary facts were established, the hearsay testimony of Petitioner's co-defendant being used over objection to bootstrap the people's case, said hearsay used as evidence of the conspiracy itself, the preliminary fact and substantive evidence of guilt rolled into one ball.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

This protection is binding on the states.

Pointer v. Texas, 380 U.S. 400.

This court has previously stated that a question of violation of the right of confrontation arises when a hearsay declarant does not testify at the Defendant's trial (as he did not in this case).

California v. Green, 399 U.S. 149.

This Court has further stated that if the question does arise in a jury trial, admission against a criminal Defendant of an alleged co-conspirator's statement violates the confrontation clause where the prosecution fails to make a prima facie showing of the preliminary facts.

Harrington v. California, 395 U.S. 250.

Substantial Federal questions are therefore concerned herein. Since the "error from which [this Petitioner] suffered was a denial of rights guaranteed against invasion by" the . . . Fourteenth Amendment, rights rooted in the Bill of Rights . . . (Chapman v. California, 386 U.S. 17, 21) the Federal harmless-error rule applies. This Court's approach was enunciated by it in Fahy v. Connecticut, 375 U.S. 85, 86-87:

> "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

Unquestionably, the evidence complained of herein was the very evidence relied on for conviction.

2. THE DELIBERATE, INTENTIONAL FAILURE OF THE OFFICER TO RECORD THE ALLEGED TELEPHONE AND OTHER CONVERSATIONS ALTHOUGH HAVING INSTANT, IMMEDIATE CAPABILITY TO DO SO AND THEN DELIBERATELY DESTROYING HIS NOTES OF THE CONVERSATIONS DENIED PETITIONER INDISPENSABLE IMPEACHMENT EVIDENCE AND POTENTIALLY EXCULPATING EVIDENCE, AND WAS A FURTHER VIOLATION OF HIS RIGHT OF CONFRONTATION AS WELL AS A SUPPRESSION OF EVIDENCE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

The officer testified he caused no tape recorder to be attached to the telephone over which he held the conversations with Petitioner and his co-defendant, even though tape recorders were routinely used with respect to telephones at that police station furthermore, the L.A. Police Department has capacity to tape record, surreptitiously, non-telephone conversations also.

The officer further testified he took notes which he later destroyed.

The highest Court of the State of California has held (People v. Hitch, 12 Cal. 3d 399; People v. Ruthford, 14 Cal. 3d 399) as has this Court that law enforcement has the duty to gather, preserve and reveal to the Defendant and jury all evidence relevant to the charge against him.

Brady v. Maryland, 373 U.S. 83.

The Supreme Court of the State of California has held that the duty of disclosure of evidence to the defense attaches in some form once the government has gathered and taken possession of the evidence and, before any request for discovery has been made; the duty is operative as a duty of preservation.

People v. Hitch, supra.

In reaching its above decision, the California Supreme Court cited decisions of this Court to the effect that (People v. Hitch, 12 Cal. 3d 641, 645-646).

"We start with the settled rule that the intentional suppression of material evidence favorable to a Defendant who has requested it constitutes a violation of due process, irrespective of the good or bad faith of the prosecution." Citing Giglio v. United States, 405 U.S. 150; Brady v. Maryland, 373 U.S. 83.

The evidence in Hitch had been destroyed, as it has been done here. There was and is here nothing in existence from which it can be determined whether the evidence would have been favorable to Defendant and material to the issue of his guilt and innocence. Therefore the Court held the duty of disclosure must operate as a duty of preservation, citing United States v. Bryant, 439 F.2d 642.

The Supreme Court of California therefore followed the rule in Bryant, supra, and held:

"We conclude it that the investigative agency involved . . . has the duty to preserve and disclose such evidence. Accordingly we hold that, where, as here, such evidence cannot be disclosed because of its intentional but non-malicious destruction by the investigative officials, sanctions shall in the future be imposed for such nonpreservation and non-disclosure unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures

designed to preserve . . . (the evidence)."

Defendant has been summarily denied the rights conferred by the due process and equal protection clauses of the United States Constitution, and the California Constitution as enunciated in the above decision. The Court of Appeals of the State of California misses the point as to the preservation of evidence as is pointed out in its opinion (Appendix A) p. 15:

> "First, Officer Lyons gave primary evidence of these telephone conversations. He was examined and cross-examined at great length relative to their substance and sequence, and he gave detailed and credible testimony concerning each call. Second, the police reports detailing these conversations had been available to Defendant before trial. Third, the notes having been 'scribbled out' for the sole purpose of enabling Officer Lyons to prepare the police reports, it is unlikely that any material of value to the defense or prosecution in the notes did not find its way into the police reports. Fourth, the 'deliberate' destruction of the notes consisted of the officer's discarding them to the waste basket after they had served their purpose and the police reports had been prepared and no request had been made for them."

It is apparent the Court has completely ignored the language and reasoning of the decisions

of this Court and the Supreme Court of California discussed above, and in another "bootstrap" argument asserts that there is no error herein because the officer said there was not, his report said there was not and since he prepared a report his testimony was reliable, credible and thorough. IF THE OFFICER HAS DELIBERATELY SWORN FALSELY, THE DEFENDANT, THE TRIAL COURT, AND OUR JUDICIAL SYSTEM ARE SUBSERVIANT TO HIS WHIM, CAPRICE, AND SUBJECTIVE DETERMINATION AS TO WHAT THE FATE OF THE DEFENDANT (PETITIONER HERE) SHALL BE. Of such stuff is the deprivation of basic constitutional rights composed.

A definitive statement by this Court setting forth guidelines to law enforcement for preserving, and making permanent, by way of tape recording, verbal (oral) evidence of serious crime will be incalculable value and will enormously cut-down the consumption of time in every State and Federal Court in United States in examining witnesses as to their memory, or lack of it, of oral utterances allegedly made. After all, an alleged sale of narcotics to law enforcement, as in the instant case, enables law enforcement to monitor the situation to obtain the highest quality of evidence due to the fact of law enforcement participation.

CONCLUSION

For the reasons outlined above the within Petition for Writ of Certiorari should be granted.

October 2, 1979

Respectfully submitted,

IRVING A. KANAREK

Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. THOMAS MICHAEL BEATTIE, Defendant and Appellant.	2 Crim. No. 32117 (Super. Ct. No. A-136863) Court of Appeal- Second Dist. F I L E D Apr 6 - 1979 Clay Robbins, Jr. Clerk Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles M. Hughes, Judge. Affirmed.

Kanarek and Berlin, and I. A. Karnarek, for Defendant and Appellant.

George Deukmejian, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, James H. Kline and Kathleen M. Crain, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant appeals from judgment entered on a jury verdict of guilty of offering to sell cocaine,[1] possession for sale of cocaine and possession of amphetamine.

Around noon an informant assisting Officer Raymond Lyons in a narcotic investigation introduced him to Robert Young. Around 5 p.m. the same day, Officer Lyons received a telephone call on his private line from a man who identified himself as Tom; he introduced himself as Ray; Tom said "I understand you are interested in purchasing an ounce of coke"; he said he was and asked if he was in a position to help him; Tom replied he had not seen his cocaine seller in a couple of days but the man had a half-pound of cocaine in his possession last time he saw him; he asked how much an ounce would cost, and Tom said between $1,700 and $2,000 per ounce; he asked if the quality was good and Tom said it was almost pure, "rock," but he would not be able to contact his seller until 5:30 p.m. and would call him back shortly thereafter.

Tom did not call; instead Robert Young called Officer Lyons on the same line around 6:45 p.m. Officer Lyons recognized the voice as that of Robert Young whom he had met that noon; Young said "'Ray . . . This is Rob from

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1

In this count (count II) Robert Young was charged as a codefendant; Young alone was charged in count I and count IV. The cause was disposed of as to Young on his plea of guilty.

this afternoon,'" Tom just left his location and would contact him a little later; the $2,000 figure discussed by Tom and him (Officer Lyons) was agreed upon, and Rob again said that Tom would contact him shortly. Around 7:30 p.m. Tom called Officer Lyons; he said there had been a change in plans and he wanted to sell him a quarter ounce of cocaine for $600 at 8:30 p.m., this was to be somewhat of a "test run" and he would have to come to Topanga Canyon to pick it up, and if it "went off without any hitches," he would be permitted to purchase the remainder of the ounce for the balance of the $2,000 price at 10:30 p.m.; Officer Lyons said the "test run" was agreeable but he was not willing to go to Topanga Canyon and would meet him in San Fernando Valley; Tom said "All right, I will get hold of you in a little while."

Meanwhile Officer Bartolotto had been surveiling an apartment at 14816 Gilmore, Van Nuys; around 6:40 p.m. he saw defendant walk from the apartment and drive away in a green Datsun; he followed defendant to Yarmouth Avenue, then to Topanga Canyon where defendant remained a half hour and returned to Van Nuys; during this time Officers Lyons and Bartolotto were in communication.

Around 8:35 p.m. Rob again called Officer Lyons and said Tom would meet him any place he desired and bring him the quarter ounce for $600; they arranged to meet at the Taco Tree at 9:15. They met as agreed, then walked to 14816 Gilmore; defendant drove up in a green Datsun and Rob said "Hey Tom"; to Officer Lyons,

defendant said "hey, you must be Ray" and they shook hands. Officer Lyons recognized defendant's voice as that of Tom (He made positive in-court identification of defendant as Tom); the three entered apartment 2 then Rob told defendant to move his Datsun; Rob obtained a gram scale and said "Come here, Ray, I will show you how this thing works," whereupon a prearranged signal was given to officers outside to serve the search warrant and arrest the driver of the Datsun.

Officer Bartolotto arrested defendant as he exited the Datsun; in defendant's left sock he found a glass vial of six grams of cocaine, and from his pants pocket he recovered a plastic vial containing amphetamine. In the opinion of Officer Lyons the six grams were possessed for the purpose of sale.

Appellant's six line assertion that the judgment should be reversed because the verdicts are contradictory and unintelligible, is without merit. The trial proceeded on counts II, III and V; the information was not amended to renumber the counts but the clerk renumbered them on the verdict forms to reflect the numerical sequence I through III. Except for the count numbers, the language of the verdict forms paralleled the statutory title and description set up in the counts in the information; and the instructions employed count designations that conformed to the statutory descriptions and count designations of the verdict forms. At no time did the jury seek clarification regarding the renumbered counts; and nothing indicates the verdict forms were unintelligible, confusing or failed to reflect the jury deliberations

as to the offenses charged and proved. The forms of verdict clearly and unmistakably expressed the jury's intention to convict defendant of the crimes charged. (People v. Bratis, 73 Cal. App. 3d 751, 763, and cases cited therein.) Finally, for his failure to register his objection[2] to the verdict forms in the trial court, appellant is precluded from raising the issue on appeal. People v. Nichols, 255 Cal. App. 2d 217, 224.)

In his second and third contentions, appellant argues that the statements of Robert Young to Officer Lyons were inadmissible hearsay, and the court erred in failing sua sponte to instruct the jury per CALJIC 6.24. Within five hours of meeting Robert Young, Officer Lyons received a telephone call from defendant on his private line; defendant started the conversation by identifying himself and saying "I understand you are interested in purchasing an ounce of coke," whereupon they arranged for the sale -- the amount, price and quality; defendant said he could not contact his seller until 5:30 and would call him back. He did not do so, instead, at 6:45 p.m. Robert Young called Officer Lyons on the same line. At this point in the evidence,

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2

Defendant waived a reading of the information; after the jury was polled, no objection was raised to the numerical designation of the counts; no such claim was made on motion for new trial and he waived formal arraignment for judgment and stated there was no legal cause why judgment should not be pronounced.

the prosecutor made an offer of proof.[3] The officer's subsequent testimony was consistent therewith. We perceive no error in the court's application of the coconspirator's exception to the hearsay rule. (§ 1223, Evid. Code.[4])

3

"It is the People's contention Mr. Young and Mr. Beattie both participated in telephone calls setting up this precise sale of cocaine, as such, they were both principals, as such they were both co-conspirators . . . [par.] In this statement, the officer will testify that Rob mentions the name of . . . Tom, indicates that they are both involved in this or to sell cocaine, Tom is not available, that at the precise moment Tom will call you back, same discussion concerning price, concerning the location, both Tom and Rob discuss the same subject matter, namely the sale of cocaine. [par.] Both refer to the same things. [par.] Clearly they are both alternately dealing with this police officer in terms of offering this coke for sale."

4

Section 1223, Evidence Code provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [par.] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; [par.] (b) The statement was made prior to or during the time that the party was participating in that conspiracy; . . ."

Before a coconspirator's hearsay statements are admissible under section 1223, Evidence Code, only a prima facie case of conspiracy need be shown. (§§ 403, 1123, subd. (c), Evid. Code; People v. Steccone, 36 Cal. 234, 238; People vl Lipinski, 65 Cal. App. 3d 566, 577; People v. Morales, 263 Cal. App. 2d 368, 375.) Where two or more persons are involved in a crime under circumstances reasonably indicating an agreement or conspiracy to commit that crime, the acts of each in furtherance of the common criminal objective are admissible. (People v. Hayes, 16 Cal. App. 3d 662, 669.) The evil or corrupt agreement that forms the conspiracy may be shown by circumstantial evidence. "Thus, is it not necessary to prove that the parties met and actually agreed to perform the unlawful act or that they had previously arranged a detailed plan for its execution. . . . the agreement may be inferred from the conduct of the defendants mutually carrying out a common purpose in violation of a penal statute [citations]." (People v. Lipinski, 65 Cal. App. 3d 566, 575-576, original emphasis.) Viewing the sufficiency of the evidence relative to the establishment of a conspiracy against the background of the type involved (In re David B., 81 Cal. App. 3d 806, 810), here narcotic activity, we conclude that the only reasonable inference from the evidence presented prior to the admission of Rob's statements, based upon the sequence, substance and time of the telephone calls by defendant and Rob to Officer Lyons on his private telephone, is that indeed they were coconspirators in a general plan designed to place cocaine in the hands of another. (People v. Lipinski, 65 Cal. App. 3d 566, 576..) The hearsay statements of

Rob were admissible against defendant.

Appellant's claim that his Sixth Amendment right to confront witnesses was violated is answered by People v. Brawley, 1 Cal.3d 277, 287-289 (cert. den. sub nom. Baker v. California (1971) 400 U.S. 993 [27 L.Ed.2d 441, 92 S.Ct. 462] and People v. Earnest, 53 Cal.App.3d 734, 743-744. However, it is clear from the record that defendant's guilt did not depend upon any such conspiracy because the direct evidence of guilt against him offered through the testimony of Officers Lyons and Bartolotto is overwhelming. Defendant communicated with Officers Lyons first, initiating negotiations for the sale of cocaine and arranging its terms; later defendant again called confirming the deal; meanwhile Officer Bartolotto identified defendant leaving and returning to the apartment to which Officer Lyons, several hours later, went to meet defendant and consummate the sale; and defendant met Officer Lyons there, and had in his possession the amount of cocaine for which they had bargained. Thus the prosecution neither was compelled or nor did principally rely on the statements of Robert Young.

Section 403, subdivision (c) (1), Evidence Code provides: "(c) If the court admits the proffered evidence under this section, the court: [par.] (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist." Defendant did not request

CALJIC 6.24,[5] in fact, took the express position that he could not do so because there was "no evidence of the preliminary facts for the jury to consider." In People v. Brawley, 1 Cal.3d 277, the court failed to reach the issue whether a trial court had a duty to give such instruction[6] on its own motion; but did say that assuming that it did, "it is not reasonably probable that a result more favorable to [defendant] as to guilt would have been reached in the absence of the error. (Cal. Const., art. VI, § 13; People v. Watson, supra, 45 Cal.2d 818, 836.)" (1 Cal.3d at p. 291.) From the recited facts it is apparent that had CALJIC 6.24 been given, it is reasonably probable that the jury would have found that Young's statements were made while participating in a criminal conspiracy, in furtherance of the objective of the conspiracy -- selling cocaine -- and at a time when defendant was also participating in the conspiracy. But even had the jury failed to so find and in determining defendant's guilt had disregarded Young's statements to Officer Lyons, it is not reasonably probable that the jury would have acquitted defendant. (People v. Brawley, 1 Cal.3d 277, 291-292.)

5

CALJIC 6.24 provides in effect that the jury is not to consider extrajudicial statements of a coconspirator unless it makes a determination from independent evidence that the four preliminary facts re conspiracy exist.

6

CALJIC 935 (Revised) involved in Brawley is substantially the same as CALJIC 6.24.

There is no substance to appellant's fourth contention that because there was a break in the chaim of custody of the two vials between the time Officer Bartolotto found them on him and the time the officer placed his identifying initials on them, there was no evidence that the contraband analyzed by the chemist was that found on his person. For about an hour and one-half the two vials were in the possession of Officer Lyons. Immediately after Officer Bartolotto arrested defendant and found the vials on his person, he gave them to Officer Lyons; Officer Lyons gave them to Officer Bartolotto at the station where he affixed his initials on the labels. However, the evidence shows that Officer Bartolotto positively identified both vials (Exhs. 1A and 1B) as those taken from defendant's person; testified that the contents appeared to be the same as when he took them from defendant and the labels on the vials when seized from defendant were on the vials when Officer Lyons returned them to him at the station where he marked them with his initials and placed them in evidence. If the jury accepted Officer Bartolotto's testimony regarding this evidence, it could and did believe the two vials (Exhs. 1A and $\frac{1}{2}$B) were those seized from defendant.

Asserting "that law enforcement has the duty to gather, preserve and reveal to the defendant and jury all evidence relevant to the charge against him," citing authorities including People v. Ruthford, 14 Cal. 3d 399 and People v. Hitch, 12 Cal. 3d 641, appellant accuses Officer Lyons of deliberately refusing to tape his conversations with him and Young, and deliberately destroying his notes regarding those conversations which,

he says, amount to law enforcement suppression of material evidence denying him due process requiring reversal and dismissal. He claims that "tape recordings and notes might have impaired the credibility of Lyons' testimony to such a degree as to destroy the prosecution case."

People v. Hitch, 12 Cal. 3d 641, establishes a duty on the part of a law enforcement agency to preserve material evidence on the issue of guilt or innocence (pp. 652-643); and the court in People v. Ruthford, 14 Cal. 3d 399 concluded that the suppression of substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process (p. 408). Concerning the notes, Officer Lyons testified that while talking on the telephone to Young and defendant he "did scribble out notes as we were talking"; the purpose of "jotting down notes" was to refresh his memory and assist him in completing a formal arrest report; and after they had served their purpose and no request had been made for them he discarded the notes several months before and ultimately they were destroyed. First, Officer Lyons gave primary evidence of these telephone conversations. He was examined and cross-examined at great length relative to their substance and sequence, and he gave detailed and credible testimony concerning each call. Second, the police reports detailing these conversations had been available to defendant before trial. Third, the notes having been "scribbled out" for the sole purpose of enabling Officer Lyons to prepare the police reports, it is unlikely that any material of value to the defense or prosecution in the notes did not find its way into the police reports. Fourth,

the "deliberate" destruction of the notes consisted of the officer's discarding them to the waste basket after they had served their purpose and the police reports had been prepared and no request had been made for them.

As to the failure to tape record the conversations, Officer Lyons testified: "The reason I didn't record it was the area of my office where the radio communications is that I have available to me, there is not a recording device at that location. The recording apparatus is kept at the other end of the hall in an additional room"; and he said the reason he did not tape the conversations was that he did not have the necessary time to request and have delivered to him the requisite recording equipment to tape the conversations. In People v. Duren, 9 Cal. 3d 218, appellant urged that his statements were inadmissible on the ground that as a matter of due process they should have been supplemented by some recorded means. Said the court: "An officer's testimony of what he has seen and heard, however, is admissible as primary evidence even though part of the same matter is incorporated into a sound recording. [Citation.] Accordingly, an officer's testimony of a conversation with a defendant is admissible in any event; the absence of a recording or transcription would merely be one of the surrounding circumstances for the court to consider in passing on the issue." (Pp. 243-244.)

Finally, appellant claims that on his motion for judgment of acquittal the court erred in refusing to permit him to reargue the admissibility of the hearsay statements of Robert Young. The trial

court correctly perceived its function in passing on the motion and properly utilized the test to be applied under section 1118.1, Penal Code -- "whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged [citations]." (People v. Valerio, 13 Cal.App.3d 912, 919.) The evidentiary issues defendant sought to raise had already been decided by the court during the trial, and were not properly within the scope of the 1118.1 motion. Clearly, the motion goes only to the sufficiency of the evidence adduced at trial after all objections and motions relative to the evidence have been disposed of.

The judgment is affirmed.

LILLIE, Acting P.J.

We concur:

THOMPSON, J.

HANSON, J.